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No. 98-266

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1998

ANNE ARUNDEL COUNTY, MARYLAND,
Petitioner,

v.

JOHN D. WEST, ET AL.,
Respondents,

UNITED STATES OF AMERICA,
Intervenor.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

REPLY BRIEF OF PETITIONER

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REPLY BRIEF FOR PETITIONER

A. The application of the exemption.

1. The United States and Respondents[1] maintain that the 29 U.S.C. § 207(k) exemption is unambiguous, and the case law consistent, and, in any event, they deem the issue one of "limited general significance," that presents a "fact-intensive law-application question that arises at the outer margin of that provision." West Br. in Opp. 7, 18. Their contentions are belied by the numerous states, local governments and national governmental organizations that have joined to file amici briefs

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[1]When referred to collectively, the United States and the Respondents are called "Opponents" herein.

urging this Court to grant review, as well as by the myriad judicial opinions attempting to interpret the law. Indeed, the need for review and clarification is perhaps best illustrated by the United States' tortuous attempt to explain its view of the exemption.[2] U.S. Br. in Opp. 8-11.

The United States says that "[r]escue service employees who spend less than 80% of their time accompanying the fire department to fire scenes are not covered by Section 7(k), even though their participation at fire scenes might be regular when such scenes occur, and even though that function at the scene of a fire might be considered integral to the operations of the fire department." U.S. Br. 9. Thus, according to the United States, while rescue and ambulance employees are "also included" in the definition of "employee[s] in fire protection activities" (where they form an integral part of the agency's activities as prescribed by 29 C.F.R. § 553.210(a)), and, while this "integral part" test is an "alternative test" to the four-part firefighter test and is clearly intended to cover rescue and ambulance employees, such employees virtually never qualify for the exemption because emergency medical services ("EMS") not rendered at the scene of a fire are "nonexempt" activities under 29 C.F.R. § 553.212(a).[3] This interpretation comports neither

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[2]The burden falls upon state and local fire chiefs to decipher and apply an exemption that the courts have labeled ambiguous, and that the enforcement authority cannot clearly explain.

[3]The United States says that EMS activities become exempt, and may exceed the 20 percent limit, if performed by someone who is "principally engaged" as a firefighter. The United States does not, however, define "principally engaged." If it intends the literal meaning of the words, *i.e.*, that firefighting must constitute the primary work, then its logic presents a conundrum; can a person continue to be "principally engaged" as a firefighter if he spends the bulk of his time performing EMS (which, as the statistics in this case and nationwide show, is the reality for firefighters)?

with congressional intent nor the language of the regulations issued by the Department of Labor (the "DOL"), and it highlights the degree of operational interference with public safety caused by the lower courts' construction of the exemption.

2. In their attempts to justify the decisions below, and to create consistency from the patchwork of § 207(k) decisions, Opponents rely, in part, on facts not established. For example, Respondents state that "Anne Arundel County EMTs are *not* employees who have 'legal authority and responsibility to engage in the prevention, control or extinguishment of a fire.'" West Br. 9 (emphasis in original). Respondents *conceded* in the district court, however, that they met the first three factors of § 553.210's four-part test, and thus conceded they have the legal authority and responsibility to engage in the prevention, control or extinguishment of fire (factor three). App. 13a (the district court stated that, "[a]t the outset, plaintiffs have conceded that the County has met its burden of proving that they satisfy the first three factors of § 553.210.").[4]

Similarly, Opponents argue that factual differences between *Christian v. City of Gladstone*, 108 F.3d 929 (8th Cir.), *cert. denied*, 118 S.Ct. 557 (1997), *Bond v. City of Jackson*, 939 F.2d 285 (5th Cir. 1991), and the case at bar justify the different

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[4]The Opponents repeat one sentence of the Court of Appeals' opinion - that Respondents "generally did not - and could not - fight fires." App. 91a. Aside from the inherent contradiction in this remark, it was the district court that made the factual findings in this case, and it found, based on Respondents' own affidavits, that they engaged in some firefighting. Findings of fact made by the district court bind the appellate court, unless the appellate court declares them to be clearly erroneous. Here, the appellate court affirmed the district court. Fed. Rule Civ. Proc. 52(a); *see Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709, 714 (1986).

outcomes (although they do not explain why the tests for exemption are also different in the various circuits). Respondents assert that "in both cases the employees' predominant activities were . . . 'fire protection activities.'" West Br. 10. As explained below, however, the facts of *Christian* and *Bond* show that the paramedics in those cases spend most of their time on what the Fourth Circuit termed a nonexempt activity -- "[m]edical services which are not rendered at the scene of any fire. . . ." App. 90a.

In *Christian*, total fire alarms and car accident calls *combined* made up *less than 20 percent* of the paramedics' total calls; the rest were medical emergencies and other types of accidents. *Christian*, 108 F.3d at 931. Those paramedics responded to merely 50 percent of the fire alarms each year. The paramedics in *Christian* had such a limited association with fire protection that the district court concluded they neither had the legal duty and responsibility to fight fires, nor performed activities concerned with fire suppression and prevention. Thus, under the Fourth Circuit's holding in the instant case, the *Christian* paramedics could not qualify for the exemption.

Moreover, Respondents claim that *Nalley v. Mayor of Baltimore*, 796 F. Supp. 194 (D. Md. 1992), and the case at bar are virtually identical, and that "*Christian*'s approving citation of *Nally* [sic] and its recognition of the difference between the situation there and the situation in *Nally* (and here) belies the claim that *Christian* and the instant case are in conflict." West Br. 14. Respondents fail to mention, however, that the portion of the *Nalley* opinion cited in *Christian* diverges completely from the *West* opinion. *Compare Nalley* at 200 and *West* at App. 13a-15a. In *Nalley*, the court found that Baltimore City's single-role paramedics did not meet § 553.210's four-part test, and thus found that "[o]n this basis alone, therefore, plaintiffs deserve summary judgment." *Nalley*, 796 F.Supp. at 200. The

court made no such finding in *West*, because the factual circumstances were different.[5]

In *Bond*, the paramedics were single-role paramedics, with no fire suppression training, who spent little time responding to fires. The court found that "[t]he primary role of the EMS employee is to tend to the medical needs of the patient." *Bond*, 939 F.2d at 286. Again, under the Fourth Circuit's view (that medical services not rendered at the scene of a fire do not qualify as exempt activities), they, too, would fail to qualify for exemption.[6]

Finally, the discussions of the regulations in this case have been limited to the first paragraph of each, however, the regulations should be viewed as a whole. Section 553.210(c), for example, specifically excludes from the exemption "the so-called 'civilian' employees of a fire department . . . who engage in such support activities as those performed by dispatchers, alarm operators, apparatus and equipment repair and maintenance workers, camp cooks, clerks, stenographers, etc." App. 108a. This paragraph supports the conclusion that the exemption was intended to cover the uniformed, sworn public

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[5]It was not disputed in this case that Respondents were trained and sworn uniformed firefighters, that they all received training in rescue, that they are automatically dispatched together with suppression division employees to *all* emergency calls received by the County involving fires (except for very minor incidents such as dumpster fires) accidents, hazardous materials spills and rescues, and that they occasionally performed some fire suppression functions.

[6]Moreover, the Fifth Circuit in *Bond* relied on a DOL Letter Ruling dated October 9, 1987, which states that an EMT need not be trained in fire suppression or evacuation procedures (much less actually perform them) to be engaged in activities which are "substantially related" to firefighting. *Bond*, 939 F.2d at 287-88.

safety employees who actually respond to emergencies (such as Respondents), but not the "civilians" who render support services.

3. The basis for the Court of Appeals denial of the exemption in this case was the 80/20 rule of § 553.212(a), which, the court found, imposes an "across-the-board limitation on the amount of non-firefighting work that employees may perform." App. 89a. The opposition briefs, in quoting § 553.212, conspicuously omit the example used by the DOL to illustrate what nonexempt work means: "[f]or example, firefighters who work for forest conservation agencies may, during slack times plant trees and perform other conservation activities unrelated to their firefighting duties." This is the type of work that the DOL considered neither "incident to [n]or in conjunction with" their exempt activities. The regulation was intended to apply to work that is "distinct from and unrelated to" the exempt work, *see Schmidt v. County of Prince William, Va.*, 929 F.2d 986, 990 (4th Cir. 1991), and should be defined in accordance with the Congressional intent to include rescue and ambulance employees under §207(k).[7]

4. Opponents seek to prevent the Court's review of *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), which essentially leaves the protection of state sovereignty to the political process. At the same time, they argue against application of the plain statement rule of *Gregory v. Ashcroft*, 501 U.S. 452 (1991), which, in light of *Garcia*, serves to ensure that congressional deprivations of state

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[7]Section § 553.212(b) permits employees to volunteer employment, provided it is "in a different capacity from their regular employment." The DOL has determined that, for paramedics who have some training as firefighters, firefighting work is not work "in a different capacity." *See* DOL Letter Ruling issued February 7, 1989.

sovereignty are, at a minimum, intentional, and not inferred from ambiguous legislation.[8] In essence, Opponents contend that the reverse approach is proper; that the County must bear the burden of proving the applicability of the exemption, and that, if there is doubt as to its applicability, the law must be narrowly construed against exemption.

Despite Opponents' protestations to the contrary, however, *Gregory* is precisely on point: the Age Discrimination in Employment Act ("ADEA"), the statute at issue in *Gregory*, was largely modeled after the FLSA, *Lorillard v. Pons*, 434 U.S. 575, 578-84 (1978); the ADEA plainly covers all state and local government employees, under a definition similar to that found in the FLSA, *see* 29 U.S.C. § 630(f) and 29 U.S.C. § 203(e); and it makes no mention of judges in the exemption at issue. Indeed, the case for application of the plain statement rule is stronger in the case at bar than in *Gregory*, as the intent of Congress to include rescue and ambulance employees is demonstrated in both the legislative history and the DOL's regulations.

Opponents argue that the plain statement rule should not be applied in this case because "Congress would be forced to draft legislation at a level of excessive detail" (U.S. Br. 17), and because "Congress has clearly stated its intent" that state and local employees be covered and "the only question here . . . is *which* provision of the FLSA covers respondents." U.S. Br. 17 (emphasis in original). These arguments, however, mirror those

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[8]The United States asserts that the County first raised the plain statement argument during its Motion for Rehearing below. In fact, the County briefed and argued the legislative intent and constitutionality issues below, and raised the *Gregory* plain statement rule at oral argument below.

of the dissenting portion of Justice White's opinion in *Gregory*, which this Court did not adopt.[9]

B. The Constitution and the application of the FLSA

Opponents rely on *Garcia* and the doctrine of *stare decisis* in arguing against review of the constitutional issue in this case.[10] As this Court has repeatedly stated, however, "stare decisis is a principle of policy and not a mechanical formula of adherence to the latest decision, however recent and questionable, when such adherence involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience." *Helvering v. Hallock*, 309 U.S. 106, 119 (1940). Further, the doctrine has only limited application in the field of constitutional law, where flexibility is necessary to permit the Constitution to adapt to the circumstances of changing times, *see New York v. United*

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[9]In Justice White's opinion in *Gregory*, he opined that "Congress . . . will be forced to draft long and detailed lists of which particular state functions it meant to regulate," *Gregory*, 501 U.S. at 478, and "[i]n the present case . . . Congress has expressly extended the coverage of the ADEA to the States and their employees. . . . The only dispute is over the precise details of the statute's application". *Gregory*, 501 U.S. at 476.

[10]The County submits that *Garcia*'s holding has been more broadly interpreted than the wording of the opinion warrants, and that this Court can find the FLSA unconstitutional as applied in this case without infringing upon the actual holding of *Garcia*, which concerned application of the FLSA to a largely federally-funded mass transit operation, and did not involve integral public safety functions. *See Garcia*, 469 U.S. at 553, 554-56. The Court further clarified the limits of *Garcia* by stating that "[t]hese cases [involving SAMTA] do not require us to identify or define what affirmative limits the constitutional structure might impose on federal action affecting the States under the Commerce Clause." *Id.* at 556, *citing Coyle v. Oklahoma*, 221 U.S. 559 (1911).

States, 326 U.S. 572, 590-91 (1946) (Douglas, J., dissenting, joined by Black, J.). This case involves what is "perhaps our oldest question of constitutional law." *New York v. United States*, 505 U.S. 144, 149 (1992).

Further, *Garcia* is anything but longstanding precedent. It is a bare majority decision, of relatively recent vintage, which resulted from the Court's decision to disregard the *stare decisis* doctrine. Contrary to Respondents' argument that *Garcia* has brought "order and predictability" to the law, what is predictable under *Garcia* is the continuation of the barrage of litigation it engendered, resulting in the imposition of enormous fiscal liabilities on state and local governments. A simple computer search of Federal Reporters and Federal Supplements between 1985 and 1998 found approximately 160 reported opinions in federal FLSA lawsuits against states, local governments and their officials, and this number does not include matters that were settled prior to or during litigation, unreported opinions, or state court suits.

Respondents characterize the principle set forth in *National League of Cities v. Usery*, 426 U.S. 833 (1976) (overruled by *Garcia*), as "an unworkable dichotomy." West Br. 22. This is the same principle, however, that the United States described, in arguing the *Garcia* case, as "carefully delimited," "carefully tailored," "a structured and workable framework," "sound and enduring," and "in harmony with the fundamental principle of federalism embodied in the Constitution." U.S. Supp. Br. 2, 8; U.S. Reply Br. on rearg. 2, 4, 10.

For the foregoing reasons, and those given in the petition, the County respectfully requests that its Petition for Certiorari be granted.

Respectfully submitted,

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